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CASE NO. 714

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In the Supreme Court of the United States

OCTOBER TERM, 1965

DELORA HUFF PAGE, Individually and as Guardian Ad Litem of STANLEY JAMES PAGE and JENNY LYNN PAGE, Minors,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF
THE SUPREME COURT
OF THE UNITED STATES

PAUL N. COTRO-MANES
Counsel for Petitioners

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CASE NO.....

In the Supreme Court of the United States

OCTOBER TERM, 1965

DELORA HUFF PAGE, Individually and as Guardian Ad Litem of STANLEY JAMES PAGE and JENNY LYNN PAGE, Minors,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your petitioner, Delora Huff Page, Individually and as Guardian Ad Litem of Stanley James Page and Jenny Lynn Page, Minors, respectfully prays that a Writ of Certiorari issue to review the decision of the

United States Court of Appeals, Tenth Circuit, in its case No. 7880, May, 1965, term.

OPINION

The opinion to be reviewed is in the United States Court of Appeals, Tenth Circuit, Case No. 7880, May, 1965, term, set forth fully in Appendix "A" hereto (page ....) and is reported in 350 F.2d 28.

JURISDICTION

This court has jurisdiction to hear and determine the issues, and such jurisdiction is invoked under the provisions of 28 U.S.C.A. 1254 (a) authorizing review by Writ of Certiorari of an opinion rendered by the United States Court of Appeals. The decision of the United States Court of Appeals, Tenth Circuit, was rendered on August 18, 1965.

QUESTIONS PRESENTED

QUESTION 1

THE SUPREME COURT SHOULD RESOLVE THE CONFLICTS BETWEEN CIRCUIT COURT DECISIONS RELATING TO THE LIABILITY OF THE UNITED STATES UNDER THE TORT CLAIMS ACT.

QUESTION 2

IS THE UNITED STATES, AS AN EMPLOYER OF AN INDEPENDENT CONTRACTOR, LIABLE FOR INJURIES

CAUSED BY THE USE OF INHERENTLY DANGEROUS AND DEFECTIVELY DESIGNED INSTRUMENTALITIES BY THE INDEPENDENT CONTRACTOR, WHERE SAID INSTRUMENTALITIES ARE OWNED BY THE UNITED STATES?

QUESTION 3

IS THE UNITED STATES A "SUPPLIER" OF A CHATTEL WITHIN THE DOCTRINE ANNOUNCED BY SECTION 392 OF THE RESTATEMENT OF TORTS, AMERICAN LAW INSTITUTE, UNDER THE FACTS OF THE CASE?

QUESTION 4

IS THE UNITED STATES LIABLE UNDER THE FEDERAL TORT CLAIMS ACT WHERE A CONTRACT ENTERED INTO BETWEEN THE UNITED STATES AND AN INDEPENDENT CONTRACTOR PROVIDES THAT THE UNITED STATES MAY PRESCRIBE SAFETY PROCEDURES, THAT GOVERNMENT SAFETY PROCEDURES ARE TO BE OBSERVED AND SAFETY PROCEDURES ARE MONITORED BY GOVERNMENT SAFETY INSPECTORS.

QUESTION 5

DID A BAILMENT RELATIONSHIP EXIST BETWEEN THE UNITED STATES

AND HERCULES POWDER COMPANY, AND IF IT DID, THEN DOES THE GENERAL LAW OF BAILMENT IMPOSE A DUTY UPON THE UNITED STATES, THE BREACH OF WHICH WOULD RESULT IN LIABILITY?

STATUTES AND ORDINANCES INVOLVED

The statute involved in this case is the Federal Tort Claims Act, 28 U.S.C.A. 1346 (b).

PRELIMINARY STATEMENT

This is a wrongful death case brought by a surviving widow and mother against the United States of America under the Federal Tort Claims Act, seeking damages from the death of her husband in an explosion which occurred at Hercules Powder Company's Bacchus works, Salt Lake County, Utah, in September, 1962, in which three men were killed.

The United States had entered into a Research and Development Contract for the perfection and development of what is commonly known as the third stage motor for the Minuteman Intercontinental Ballistic Missile.

Pursuant to the written contract between the United States and Hercules, Hercules Powder Company had the authority to have fabricated, either directly or through a third party, tools, dies, molds and other instrumentalities, the title to which was to vest in the United States upon the completion of their manufac-

ture. The United States paid for such equipment, and following the termination of the contract or at any time during the performance of the contract, possession of such equipment could be taken by the United States.

During the performance of the contract, an explosion occurred on the 22nd day of September, 1962, when a mold, referred hereinafter as an "FPC mold," used to manufacture subscale "Minuteman" motors either fell, was pushed or was knocked over, which caused the mold to detonate or explode, which in turn caused 7 other molds standing adjacent to and in the same room likewise to explode or detonate.

All of the molds were owned either by the United States Air Force or the United States Navy, and bore identification numbers of the Air Force or Navy, and had been manufactured by fabricators employed by Hercules Powder Company or by Hercules Powder Company itself under the terms and conditions of the contract between the government and Hercules. The design for the molds had been developed by Hercules Powder Company in 1946, at a government-owned arsenal, and it is admitted that the plans for said mold were the property of the United States and that government employees at Bacchus, Utah, had access to the plans and had authorized the construction of the molds themselves, and approved modifications of the basic design prior to their construction. A government safety inspector had seen the molds on various occasions, and had examined them for leaks prior to the explosion.

The molds were filled with high explosive granular powder, supplied and owned by the government, and

liquid nitroglycerine (89.95% pure), supplied by Hercules Powder Company.

As the printed record of this case does not contain any exhibits, petitioner herein has attached hereto as Appendix "B" a photo-reproduction of an FPC mold so that the court can better understand the nature of the mold.

The molds stand six foot three inches in height, 9 inches in diameter, and stand on a base with a center width of 11 inches. When loaded with powder and nitroglycerine it weighs 340 pounds. No provision is made in its design for it to be tied or fastened, but it merely stands on the floor upright on its own weight. A fall of one of these units would result in an explosion.

ARGUMENT

QUESTION 1

THE SUPREME COURT SHOULD RESOLVE THE CONFLICTS BETWEEN CIRCUIT COURT DECISIONS RELATING TO THE LIABILITY OF THE UNITED STATES UNDER THE TORT CLAIMS ACT.

It is respectfully submitted that there are conflicts in decisions rendered by the circuit courts in regard to the same subject matter which conflicts have manifested themselves in the case now brought before the court seeking a writ of certiorari.

A. The 10th Circuit in its decision in the instant case cites with approval *Kirk v. United States*, 270

F.2d, 110 (9th Cir) as authority for the proposition that failure to enforce safety regulations and directives by government employees would not create liability as there was no duty on the part of the government to enforce safety regulations and directives although the contract between the government and contractor provided that the safety regulations and directives would be followed.

Petitioner contends that the Kirk case is in conflict with *Schmid v. United States*, 273 F.2d 172 (7th Cir), which holds that failure to enforce safety regulations breaches a duty owed by the United States. The rationale of the two cases are in conflict.

B. Petitioner further respectfully submits that the question of strict or absolute liability against the United States under the Tort Claims Act has created conflicting decisions, which were not laid to rest with *Dalehite v. United States*, 346 U.S. 15, 97 L. ed 1427, 73 S.Ct. 956. The government was held liable on the theory of absolute liability in *United States v. Praylou*, 208 F.2d 291, Cert. Denied, 347 U.S. 934, 98 L.ed 1085, 74 S.Ct. 628, but the 10th Circuit in the instant case specifically rejects this doctrine as being applicable under the Tort Claims Act.

C. Petitioner cannot reconcile the holding in *United States v. Pierce*, 235 F.2d 466 (6th Cir) with the decision in the instant case. The Pierce case is four square with the Page case, except the only distinguishing fact being that in Pierce the government owned the land while in Page the government owned the chattel which caused the accident. Such a distinction is not a legally sound basis for failing to follow the prior decision.

D. An attempt to reconcile the many decisions arising from cases seeking to hold the government liable under the Tort Claims Act has created much discussion and comment of the jurists and legal writers who seek to draw some definable standards of duty and conduct on the part of the United States. While many cases may be distinguished by definite state decisions, others seek to apply general tort law principles and in so doing have run into a stumbling block of a reluctance on the part of the circuit courts, for the most part, to apply anything but a very strict interpretation upon the scope of the Tort Claims Act. This trend would seem to be inconsistent with the recent Supreme Court's decisions which have tended to liberalize the strict interpretation as laid down in Dalehite. *Halethey v. United States,* 351 U.S. 173, 100 L.ed 1065, 76 S.Ct 745; *Indian Towing Co. v. United States,* 350 U.S. 61, 100 L.ed 48, 76 S.Ct 122.

It is respectfully submitted that it is time for Dalehite to be revisited and re-examined in the light of modern tort law standards of duty and conduct, and in particular with regard to the rule of the United States as employer of independent contractors engaged in inherently dangerous undertakings or using inherently dangerous instrumentalities in performance of their contracts.

QUESTION 2

IS THE UNITED STATES, AS AN EMPLOYER OF AN INDEPENDENT CONTRACTOR, LIABLE FOR INJURIES CAUSED BY THE USE OF INHERENTLY

DANGEROUS AND DEFECTIVELY DESIGNED INSTRUMENTALITIES BY THE INDEPENDENT CONTRACTOR, WHERE SAID INSTRUMENTALITIES ARE OWNED BY THE UNITED STATES?

It is submitted that the general law of the United States is that an employer of an independent contractor is liable for injuries caused by the failure of an independent contractor to exercise due care in respect to the performance of work which is inherently or intrinsically dangerous. *Fegles Construction Co., et al, v. McLaughlin Construction Co.,* 205 F.2d 637 (9th Cir 1953); Restatement of the Law of Torts, Sect 427; 23 ALR 1085. Utah recognizes this principle. *Gleason v. Salt Lake City,* 94 U.1, 74 P.2d 1225; *Niblock v. Salt Lake City,* 100 U.573, 11 P.2d 800; *Morris v. Salt Lake City,* 35 U.474, 101 P.343. As this is the law of Utah, it is the law which must be followed in determining the liability of the United States. *Reyonier, Inc. v. United States,* 352 U.S. 315, 1 L.ed 2d 354, 77 S.Ct 374.

It is respectfully submitted that the United States cannot insulate itself from liability by contracting out work which is known to be dangerous and hazardous where government employees on the operational level of government have knowledge or should have had knowledge that the independent contractor is using faulty and unsafe equipment owned by the government.

Admittedly, the court has said that ownership of a dangerous instrumentality does not create liability, *Dalehite v. United States,* op. cit., however where the instrumentality is used on the operational level of gov-

ernment or is obtained at the operational level, the Dalehite rule does not apply as the liability flows not from ownership but from its use.

This does not create absolute liability, but merely places the government on the same footing as a private person. This places on government employees the duty to exercise the degree of care commensurate with the risk involved. *United States v. Pierce,* 235 F.2d 466 (6th Cir 1956); *Stancil v. United States* (Va. 1961), 196 F. Supp 478. *White v. Pinney,* 99 U. 484, 108 P. 2d 249; *Loos v. Mt. Fuel Supply Co.,* 99 U. 496, 108 P.2d 254; *Parrott v. United States* (Calif 1960), 181 F. Supp 425; *Barroll v. United States* (Md. 1955), 135 F. Supp 441; *Bullock v. United States* (Utah 1955), 133 F. Supp 885.

Therefore, the government had a duty to see that the instrumentalities used by its contractor were suitable for the work undertaken, and as a part of that duty there was the obligation of inspection and testing. This duty was not only owing to third persons but to employees of the independent contractor. *Reynolds v. American Foundary,* 121 U. 130, 239 P.2d 209; *Pierce v. United States,* op. cit.

The employees of the government, in failing to adhere to this duty, or in doing so in a faulty and negligent manner, therefore created liability actionable under the Tort Claims Act. The 10th Circuit Court erred in not applying this legal reasoning to the instant case.

QUESTION 3

IS THE UNITED STATES A "SUPPLIER" OF A CHATTEL WITHIN THE DOCTRINE ANNOUNCED BY SECTION 392 OF THE RESTATEMENT OF TORTS, AMERICAN LAW INSTITUTE, UNDER THE FACTS OF THE CASE?

The Restatement of Torts, Section 392, states:

> "Chattel dangerous for intended use. One who supplies to another directly or through a third person, a chattel to be used for the suppliers' business purposes is subject to liability to those for whose use the chattel is supplied, or to those whom he should expect to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by the persons for whose use the chattel is supplied."

This doctrine has been accepted by Utah. *Reynolds v. American Foundry and Machine*, (1952), 121 U. 130, 239 P.2d 209.

The court below sought to distinguish the rule from the facts of the case by holding that as the government never had actual possession or control of the instrumentality, the government was not a "supplier" within the meaning of the above section.

With this petitioner respectfully disagrees. Ownership of the molds was in the government; the plans from which the mold was made belonged to the government; the government had the right to inspect, at any time, during the manufacture of the molds; the government had the right to inspect the molds after manufacture; the government had the right to possession at any time;

the government had the right to restrict the usage of the molds, and restrict their removal from the plant. In short, while actual possession was with Hercules, the government had control either active or constructive over the molds. The lower court did not correctly apply the doctrine. As pointed out in a California case:

> "If the chattel is made by a third person, the lessor is required to exercise reasonable care to inspect it before turning it over the lessee. . . ."
>
> McNeal v. Greenborg
> 40 Cal.2d 740, 225 P.2d 810

It would seem incongruous to allow a tortfeasor to escape liability by saying that as physical possession did not come into his hands he cannot be held liable for property which he owns, which he paid for, which is used in his business, which was manufactured from his plans and specifications, which he has the right to inspect at any time, and which he has the right to possession of at any time.

It is submitted that a private person could not escape liability under such a theory, and the United States Government should not be permitted to do so.

Petitioner asserts that the position of the government is analogous to a manufacturer who incorporates into his product a component made by another. *MacPherson v. Buick Motor Co.*, 217 NY 382, 111 NE 1050; Utah has adopted this legal principle. *Hooper v. General Motors Corp.*, 123 U. 515, 260 P.2d 549. In a very recent Utah case, *Leininger v. Stearns-Roger Manufacturing Co.*, ... U.2d ...., 404 P.2d 33 (July 12, 1965) the Utah high court said:

> "An important limitation on the rule placing building contractors on the same footing as sellers of goods is that the contractor is not liable if he has merely carried out the plans, specifications and directions given him, since in that case the *responsibility is assumed by the employer. . . .*" (Emphasis ours)

The government had a duty to inspect the FPC molds for suitability and its failure so to do, or to do so properly, as the evidence showed that the government safety inspector did in fact inspect the molds, clearly creates liability.

QUESTION 4

IS THE UNITED STATES LIABLE UNDER THE FEDERAL TORT CLAIMS ACT WHERE A CONTRACT ENTERED INTO BETWEEN THE UNITED STATES AND AN INDEPENDENT CONTRACTOR PROVIDES THAT THE UNITED STATES MAY PRESCRIBE SAFETY PROCEDURES, THAT GOVERNMENT SAFETY PROCEDURES ARE TO BE OBSERVED AND SAFETY PROCEDURES ARE MONITORED BY GOVERNMENT SAFETY INSPECTORS.

The court below cites *Kirk v. United States,* 270 F.2d 110 (9th Cir) as authority for the proposition that there could be no liability in the instant case as there was no duty for the United States to inspect and force compliance with safety regulations. This case would appear to be in conflict with *Schmid v. United States,* 273 F.2d 172 (7th Cir).

It is respectfully submitted that the rationale of Kirk and Schmid are in conflict and that the court should resolve the different positions of the 9th Circuit and the 7th Circuit.

It is submitted that the Kirk case is not applicable, in any event, to the case now before the court. Where explosives and inherently dangerous instrumentalities are being used, an employer has a duty toward third persons coming into contact with these instrumentalities, and a duty arises separate and apart from the duty to enforce safety regulations. The 9th Circuit Court recognized this in the case of *United Air Lines v. Weiner, et al,* 335 F.2d 379 (9th Cir) wherein the court said:

> "In those cases (Kirk v. U.S.) we held that legal duties on the part of the government were not to be inferred from certain regulations, manuals, directives . . . in circumstances where a legal duty towards the claimants was not otherwise owing."

It is further pointed out that the government, in the instant case, maintained a government safety inspector at the Hercules Plant as one of the 104 federal employees at the plant. The government assumed the role of active participation in safety, therefore a duty to do the task properly was created. *Indian Towing Co. v. United States,* op. cit.; *United Air Lines v. Weiner, et al,* op. cit.

It is respectfully pointed out to the court that the appellate court mistakenly held that the government did not undertake safety precautions, and therefore became obligated under the "good samaritan" doctrine (Indian Towing Co. v. United States, op. cit.). Exhibit

6 introduced by the plaintiff showed that the government did in fact undertake safety inspections and did direct the safety operations of Hercules' operations at its plant at Bacchus, Utah.

QUESTION 5

DID A BAILMENT RELATIONSHIP EXIST BETWEEN THE UNITED STATES AND HERCULES POWDER COMPANY, AND IF IT DID, THEN DOES THE GENERAL LAW OF BAILMENT IMPOSE A DUTY UPON THE UNITED STATES, THE BREACH OF WHICH WOULD RESULT IN LIABILITY?

The undisputed and stipulated facts of the case showed that the FPC molds were the property of the United States, that Hercules Powder had possession of them, that Hercules was obligated to return the FPC molds to the United States upon completion of the contract or upon demand of the government, that the molds were used for the mutual benefit of both parties. It is submitted that all the elements of a classic bailment are present. In a Court of Claims case, *Ekco Products Co. v. United States* (Court of Claims), 312 F.2d 768, the court said:

> "Defendant (United States) owned and kept title to the (machinery) during the entire period of production. Use and possession of the facilities, however, were given to (Plaintiff). The bailor-bailee relationship thus created was for the benefit of both parties."

> "Where there is a bailment for the mutual benefit of the parties, there is imposed on the bailor, in absence of a special contractor representation, an obligation that the thing or property bailed for use shall be reasonably fit for the purposes, or capable of the use known or intended."

Utah law likewise requires a suitability for intended purposes. As stated in *Reynolds v. American Foundry and Machine,* op. cit.:

> ". . . the authorities uniformly call for a higher standard of care from a supplier of chattels than is required of one who furnished the chattels gratuitously and not for his own business purposes. The supplier is required to employ reasonable care in discovering any dangerous character or condition thereof."

The court below held that this case was not applicable as actual possession of the bailed instrument by the bailor is required before this rule applies. It is submitted that the record of the case shows that government employees passed upon the plans of the FPC molds before they were manufactured and in fact the plans were property of the United States. Any reasonable inspection of these plans would have revealed their inherently dangerous instability due to the small base upon which they stood.

As the FPC molds were in the possession of Hercules as bailed property, the government had a duty to see that such property was fit and safe for the intended purposes and a failure on the part of government employees to ascertain the suitability and fitness of said molds would create actionable liability.

SUMMARY

It is respectfully submitted that the denial of liability on the part of the United States for the death of Stanley Page is manifestly unjust and contrary to the tort laws of the State of Utah. If the United States had been a private citizen of Utah there could be no doubt as to the outcome of the case. The record shows a flagrant disregard for safety.

The Honorable Supreme Court should, if for no other reason, correct this denial of justice by granting your petitioner a writ of certiorari. However, there are other important issues involved.

It is respectfully submitted that since the courts ruling in Dalehite v. United States, a steady erosion of the principles announced therein has been taking place, not only in the district and circuit court opinions but in the Supreme Court itself.

It is submitted that this case, sought to be presented to the Honorable Court, may be used as the vehicle to pronounce a clear cut and definitive statement of the liability of the United States operating as an employer of an independent contractor on the operational level of government. It is respectfully submitted that citizens of the United States and of the several states are in doubt, as is the government itself, as to just what the liability is of the United States under similar factual situations such as are found in the instant case.

If the restrictive pronouncements of Dalehite are the law today, or if Dalehite is distinguishable where the government acts other than in a *discretionary* capacity,

then the Supreme Court should clarify the confusion that has resulted from the attempt of the several district and circuit court decisions to do justice but to pay heed to the prior guide lines of former decisions.

Respectfully submitted,

PAUL N. COTRO-MANES
Counsel for Petitioners

APPENDIX "A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7880 — MAY 1965 TERM

UNITED STATES OF AMERICA, Appellant, v. **DELORA HUFF PAGE,** individually and as Guardian Ad Litem of **STANLEY JAMES PAGE** and **JENNY LYNN PAGE,** Minors, Appellee.	Appeal From The United States District Court of Utah, Central Division.

Martin Jacobs, Attorney, Department of Justice, Washington, D.C. (John W. Douglas, Assistant Attorney General, William T. Thurman, United States Attorney, and Alan S. Rosenthal, Attorney, with him on the Brief), for Appellant.

Paul N. Cotro-Manes, Salt Lake City, Utah, for Appellee.

Before PICKETT, LEWIS and SETH, Circuit Judges.

SETH, Circuit Judge.

This is an action brought under the Federal Tort Claims Act, seeking damages for the death of the

decedent, Stanley G. Page, who was an employee of Hercules Powder Company. The company is not a party. At the time of his death in an explosion the decedent was employed in the manufacture of solid fuel propellants for model experimental rockets to be used by the United States Government. The work was performed at Bacchus, Utah, in a plant owned by Hercules Powder Company pursuant to a cost plus fixed fee research and development contract with the United States. The contract provided that the Government would supply certain material and supplies. The Government acquired title to property which was purchased by the contractor for which reimbursement was to be made. Title was vested in the Government at the time the property was acquired by the contractor. The Government provided in this contract that Hercules was to comply with specific safety requirements, including certain Air Force technical orders, and further was to comply with "any additional safety measures required by the Contracting Officer." There were Air Force officers and civilian personnel located at the plant, and at the adjoining plant where the contractor performed other duties for the Government. The Government employees in both plants numbered approximately one hundred and four. At the plant in question, Hercules employed approximately three thousand persons. The Air Force officers were charged with the duty of seeing that the contractor performed his duties in accordance with the contract and to see that the contractor properly accounted for and handled Government property. There was an Air Force officer who had the title of "Safety Engineer" whose duties extended to both plants, and

it was his responsibility to "monitor" the contractor's safety performance under the requirements of the contract.

The manufacture of the solid fuel propellant required the mixture of a form of gunpowder with the solvent containing plasticizers and 89.95 per cent pure liquid nitroglycerin. This mixture was placed in a mold and was cured under varying conditions for a period of some seven or eight days, after which time the molds were removed from the curing process. These molds consisted of an eleven-inch square aluminum base upon which was placed a cylinder about nine inches in diameter. On top of this cylinder, another aluminum top plate was attached together with certain air hoses. The total mold was about six feet three inches in height and when filled weighed about 340 pounds.

The explosion which caused the death of the decedent and two fellow workers occurred at a time when they were moving these filled molds from the curing room and placing them upon a small trailer to be moved from the curing building. There was provided in the curing room an air hoist which was attached to overhead track. The molds were lifted by means of this hoist and moved through a doorway and with the hoist loaded onto the trailer. At the time of the explosion, three of these molds had been placed upon the trailer, one was in the process of being moved along the track, and four were standing on the floor of the curing room, the ventilating hoses having been removed from their wall connections. The molds so standing were not supported or fixed by any ties or fastenings to the walls or ceiling of the room

but were merely standing on the floor by their own weight.

By reason of the force of the explosion, the witnesses found it difficult to determine where the initial explosion took place and were unable to determine the exact cause of the explosion.

As will be hereinafter more fully described, the court found that the Government employees were negligent in that they did not supervise properly the industrial safety practices of the contractor nor did they prescribe additional safety practices or properly inspect the Government property as to safety. The court found that the Government had a duty in this connection by reason of the rights reserved under its contract to prescribe and impose safety regulations in addition to those contained in the contract, and also by reason of the Government's reserved right to inspect the plant and work performed by the contractor. The court further found that the molds were inherently dangerous by reason of their size, shape, and the materials from which they were made. The court therefore rendered judgment in favor of the plaintiffs, and this appeal has been taken by the Government.

As stated above, the trial court found a duty from the United States to the decedent by reason of the contract provisions reserving a right in the United States to prescribe safety requirements in addition to those set out in the contract, and in the right to inspect contractor's facilities and work. The appellee contended below and here that the reservation of such powers to the United States in the contract created a duty to the

decedent. The authorities do not however support the argument.

The fact that the contract may have reserved to the United States the right to inspect the work and facilities of the independent contractor, and the right to stop the work, does not in itself override or alter the general rule of nonliability for the torts of the contractor because no duty is created to employees or third parties. This includes the reservation to inspect for the adherence to contract safety provisions. Kirk v. United States, 270 F.2d 110 (9th Cir.). In the cited case an employee of an independent contractor doing dam work for the United States was killed when a scaffold collapsed and he fell into the river. The claimants contended that the Government officials were remiss in not enforcing the safety regulations as to safety belts, nets and rescue equipment, and in not inspecting more carefully the scaffold and the methods used to move it. The court rejected the contentions and found no duty arose by the contract, by the statute under which the contract was executed, nor by the Government's undertaking a safety program. The fact that the work and duties of the independent contractor and of his employees originate in a contract, in plans, or regulations issued by the Govenrment does not create a duty by it to the employees where there was not such an affirmative control and direction by Government officials over the employees or interference in the work of the contractor as to create conditions where there was in fact no independent contractor. The court in Grogan v. United States, 341 F.2d 39 (6th Cir.), also considered a claim based on the Government's failure to inspect scaffolding

used by an independent contractor. It there said there was a right reserved, but no duty was created. The contractor there had designed and built the scaffold. See also Cannon v. United States, 328 F.2d 763 (7th Cir.).

Could it be that the United States is liable because although it may not have a duty, it undertook to administer a safety program and thereby became liable for its negligence in carrying it out? Indian Towing Co. v. United States, 350 U.S. 61, and Rayonier, Inc. v. United States, 352 U.S. 315; Grogan v. United States, supra; Kirk v. United States, supra. In Blaber v. United States, 332 F.2d 629 (2d Cir.), the court considered an accident which took place in the laboratory of an independent contractor who was conducting contract research and development work for the Atomic Energy Commission. The claimant was killed when an explosion occurred while employees were burning thorium. The court in the cited case referred to the periodic inspections made by AEC representatives of the contractor's plant to see that safety regulations were complied with. The Commission also received periodic reports on safety, it conducted air sample and other tests with regard to radiation. The court found that the doctrine of Indian Towing Co. v. United States, supra, and Rayonier, Inc. v. United States, supra, did not apply. The court in Blaber held that the contractor had the primary responsibility for safety of its employees and the contractor was charged with and supervised the particular duty which was being performed when the thorium exploded. The same standards are applicable to the case at bar. Hercules had the primary responsibility for the safety of its employees; it had the

direct control and supervision over them, and they were working in its plant. Further, it had the duty to perform and supervise the individual functions, the total of which produced the end product. The function the decedent was performing was but one of many of these in this chain of production. It and the safety of those then working was under the exclusive control and supervision of Hercules. The safety program of the Government did not constitute an exercise of any such control. The fact that the activity may be dangerous has no consequences on this issue. See Wallach v. United States, 291 F.2d 69 (2d Cir.). See also Buchanan v. United States, 305 F.2d 738 (8th Cir.); Nyquist v. United States, 226 F. Supp. 884 (D. Mont.).

The trial court found that the "exact cause" of the explosion was unknown, that the first detonation occurred inside the center bay of the building, ". . . and the greater probability, but while still conjecture, is that an FPC mold set was either pushed or pulled over or that an object or thing impacted with a mold set with sufficient force to detonate it." The immediate supervisor of appellee, and of the other two men killed, had stepped out of the building where the explosion took place just before it occurred. He testified that when he left, one of the mold sets or containers was raised on a hoist while being loaded on a small trailer outside the building. He instructed the men to straighten out the container, and departed for other duties without waiting to see what was done. At this time there were several molds already loaded on the trailer and also several still in the room inside the building. As mentioned, the court found the initial detonation to have taken place

inside the room. From the record it would appear that this was fairly near the doorway through which the molds were being loaded on a trailer. These findings of the court would indicate that the failure was a human one which caused one of the molds to fall, being knocked or pushed in some manner by the workmen, or struck with some object.

The trial court also found that ". . . employees of the United States omitted to properly supervise the activities of Hercules . . . in maintaining safe industrial practices. . . ." The court apparently felt this resulted from inadequate inspections and from a failure to initiate different procedures. There was however no evidence that would show what "practices" or manner of performing the work was inadequate or dangerous nor what should have been done instead. There was also no showing of any causal connection between any improper "practice" or defective equipment and the accident. All of the testimony bore on the design of the molds, and the testimony that one in the room in question had leaked. The court's finding that one had fallen or been struck precludes a causal connection between the fact one leaked and the accident. The matter of the design of the mold will be considered below. Thus the finding of a failure to supervise has no connection with the accident.

What of the design of the molds? The court found that they were ". . . inherently and intrinsically dangerous due to their instability. . . ." The court found that prior to loading the molds were standing upright on the floor of the room, and were not supported by ties or fastening. The molds were six feet three inches in height,

weighed about 340 pounds when filled and stood on a square aluminum base plate ". . . having a center width of 11 inches. . . ." The court found that the mold was designed about 1946 at a plant operated by Hercules but owned by the United States, that the plans belonged to the United States, and that Hercules had made the molds in question. It also found that the molds were in the possession of Hercules, but on termination of the contract, or on demand, possession by Hercules of the molds had to be surrendered to the United States. The molds were marked with Air Force or Navy identification numbers. The design for the molds was approved by representatives of the United States. These findings are all supported by the record, and were not in substantial dispute.

The Government acquired ownership of the molds by virtue of the reimbursement contract with Hercules. This ownership was real, but it was technical in the sense that the United States never had possession nor exercised control over the molds. As mentioned, they were manufactured by Hercules, an independent contractor, used only by it and never out of its possession. They were so used at the time of the accident and before in its own plant where the contract was being performed. The United States thus did not in fact "supply" the molds to Hercules; instead Hercules made them itself and the design was of its origin apparently in 1946 although it belonged to the United States and was approved by it. Apparently the trial court arrived at its conclusion on this point from ALI Restatement, Torts § 392. The rule there stated is limited to circumstances where the chattel is "supplied" by the person sought to

be held liable, and was at one time in its control and possession. The typical situation would be where such person made or assembled them, then furnished or "supplied" them to another. The cases of Reynolds v. American Foundry & Machine Co., 121 Utah 180, 239 P.2d 209, and Palmer v. Wasatch Chemical Co., 10 Utah 2d 383, 353 P.2d 985, both concerned chattels furnished to another after a period of possession and control by the person sought to be held liable. Under the facts before us, the United States was not a "supplier" within the purpose or meaning of the Restatement doctrine. The Government at most had the bare ownership of the molds, and never had even possession of them.

In any event as to the dangerous chattel issue, the Tort Claims Act contemplates circumstances where there is negligence of a Government *employee* either by act or omission. It does not by its terms include liability imposed by other doctrines having their origin in warranties, in product liability, or in absolute liability. Dalehite v. United States, 346 U.S. 15, 44; Mahoney v. United States, 339 F.2d 605 (6th Cir.); Dushon v. United States, 243 F. 2d 451 (9th Cir.); United States v. Taylor, 236 F.2d 649 (6th Cir.); Strangi v. United States, 211 F.2d 305 (5th Cir.); Harris v. United States, 205 F.2d 765 (10th Cir.); United States v. Hull, 195 F.2d 64 (1st Cir.).

Thus we hold that the United States was not a "supplier" in the sense required to hold it liable under this rule here sought to be applied; in any event the Tort Claims Act does not include liability based on such a doctrine. The Act does not express a policy or purpose

as broad or which includes that implicit in the rule sought to be applied.

The trial court concluded that "although not necessary to the decision of the case" because of the inherently dangerous nature of the work, the Government would be liable under Utah law as expressed in Section 427 of the Restatement of Torts for the negligence of the independent contractor. Section 427 provides that:

> "One who employs an independent contractor to do work which is inherently dangerous to others is subject to liability for bodily harm caused to them by the contractor's failure to exercise reasonable care to prevent harm resulting from the dangerous character of the work."

There is no question but that Hercules was a responsible independent contractor properly selected. Also, liability under this theory is no predicated on actual control or interference exercised or reserved by the United States, and the record shows there was none. Rather, the duty imposed upon the United States, if any, stems entirely from the nature of the activity and the hazards it creates to third persons.

The general law on the subject casts serious doubts as to whether the doctrine of nondelegable duty as here involved applies to injuries to employees of the independent contractor. Corban v. Skelly Oil Co., 256 F.2d 775 (5th Cir.), expressly held that it did not so apply. Similar holdings appear in Galbraith v. United States, 296 F.2d 631 (2th Cir.); Sword v. Gulf Oil Corp., 251 F.2d 829 (5th Cir.); Hurst v. Gulf Oil Corp., 251 F. 2d 836 (5th Cir.); Cagle v. McQueen,

200 F.2d 186 (5th Cir.). The Utah Supreme Court apparently has not been faced directly with this question, but the view taken by the court in the above cited cases is supported by dictum in Dayton v. Free, 148 Pac. 408, and nothing to the contrary has been advanced. But in any event it must be first decided whether an independent contractor is an "employee" within the meaning of 28 U.S.C.A. § 1346(b) so as to render the United States liable for the contractor's negligence under the Federal Tort Claims Act.

The Supreme Court in the Dalehite case has interpreted the Tort Claims Act to "require clear relinquishment of sovereign immunity to give jurisdiction for tort actions." Dalehite v. United States, 346 U.S. 15 at 31. The Tort Claims Act provides that the United States District Courts shall have jurisdiction of claims against the United States for money damages:

> "... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any *employee of the Government* while acting within the scope of his office or employment, under circumstances where the United States, if private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C.A. § 1346(b). (Emphasis added).

Thus, a prerequisite to liability of the United States under the Act is that the act or omission be by an "employee of the United States." An independent contractor is not an "employee" of the Government and recovery cannot therefore be had against the United States for

Hercules' negligent acts. Dushon v. United States, 243 F.2d 451 (9th Cir.) (dictum); Strangi v. United States, 211 F.2d 305 (5th Cir.); Nyquist v. United States, 226 F.Supp. 824 (D. Mont.); Benson v. United States, 150 F. Supp. 610 (N.D. Calif.); Hopson v. United States, 136 F. Supp. 804 (W.D. Ark.).

The case is REVERSED with direction that the cause be dismissed.

APPENDIX B

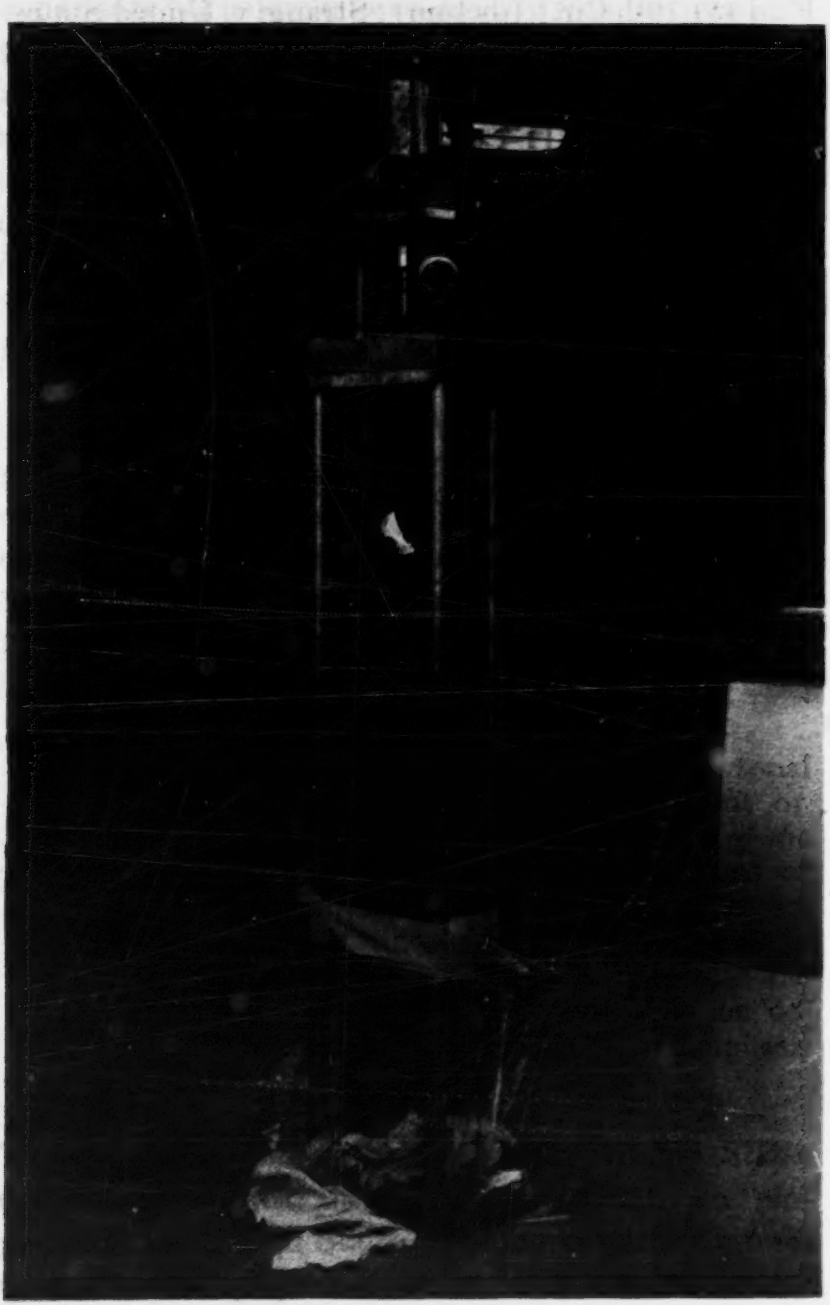

EXHIBIT NO. 17

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 714

DELORA HUFF PAGE, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-31) is reported at 350 F.2d 28. The findings of fact and conclusions of law of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1965. The petition for a writ of certio-

rari was filed on November 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government owed employees of its admittedly competent independent contractor the duty to supervise the contractor's performance of the contract to ensure that the work was done in a safe manner.

2. Whether the government owed employees of its contractor engaged in dangerous work on the latter's premises a non-delegable duty to ensure that the contractor safely performed the work.

3. Whether the court of appeals correctly determined that the government was not the supplier of the allegedly dangerous instrumentality used by the employees of its contractor.

STATEMENT

This is an action for damages under the Tort Claims Act for the alleged wrongful death of an employee of an independent contractor with the government, which occurred as the result of an explosion at the contractor's plant. The undisputed facts, as they appear from the opinion of the court of appeals, may be summarized as follows:

The contractor, Hercules Powder Company, had been engaged by the government to perform a cost-reimbursement plus fixed-fee contract for research and development work on the Minuteman Intercontinental Ballistic Missile. The contractor supplied the

necessary personnel, facilities, and materials, and the government furnished various items of equipment and supplies. Under the contract, title to property acquired by the contractor vested in the United States at the time of its acquisition. The contract provided that Hercules was to comply with specific safety requirements, including specified Air Force technical orders, and any additional safety measures required by the contracting officer.

One item manufactured by Hercules under the contract was solid fuel propellant for scale model experimental rockets. The propellant was made by placing a mixture of explosive powder, plasticizers, and nitroglycerin in a mold and subjecting the mold to a curing process. The explosion which resulted in the death of petitioner's decedent and two fellow workers occurred while they were removing a number of these molds from the curing room and placing them on a trailer outside the curing building.

Although finding that the exact cause of the detonation was unknown, and the "greater probability, but while still conjecture, is that an FPC mold set was either pushed or pulled over or that an object or thing impacted with a mold set with sufficient force to detonate it" (Pet. App. 25), the district court held the government liable for Page's death, on the ground that provisions of the contract imposed on the government various duties to the contractor's employees and that breach of those duties was the proximate cause of the death of petitioner's decedent. The court of appeals reversed, holding that contract provisions which reserve to the United States the right to prescribe safety re-

quirements in addition to those set out in the contract and to inspect the contractor's facilities and work do not create duties to employees of the contractor. The court also noted that under established principles of tort law no such duty arose as a result of the government's having undertaken to make safety inspections, since the contractor retained primary responsibility for the safety of its employees and directly supervised and controlled their work. In any event, the court of appeals stressed, there was no showing of a causal connection between any improper practice or defective equipment and the accident; the district court's findings indicated, rather, that the "failure was a human one which caused one of the molds to fall" (Pet. App. 26).

The court of appeals rejected petitioner's argument that the government was the supplier of a dangerous chattel, liable for any injury caused by the chattel if it failed to exercise reasonable care to make the chattel safe for the use for which it was supplied. The court pointed out, among other things, that the government was not the supplier of the chattel involved (the mold sets) for purposes of tort liability, since it merely had bare title, not possession or control.

ARGUMENT

The court of appeals correctly concluded that in the circumstances of this case the government was not liable under the Tort Claims Act for the death of petitioner's decedent. The decision of the court of appeals is not in conflict with the decision of any other

court of appeals, nor does it raise any significant questions of law warranting review by this Court. Accordingly, further review is not warranted.

1. The courts have consistently held that contract provisions, such as those in the instant case, reserving to the government the right to inspect the contractor's work and facilities to ensure that the contract is complied with, and to prescribe safety requirements in addition to those spelled out in the contract, do not create actionable duties of the government toward employees of the contractor;[1] the reason is that the contractor, not the government, is responsible for and exercises direct supervision and control over the employers and their work. For the same reason, the government is not deemed to assume obligations to the independent contractor's employees by undertaking to make safety inspections.[2] At all events, as the court

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[1] *E.g., Kirk* v. *United States*, 270 F.2d 110, 116-118 (C.A. 9); *Blaber* v. *United States*, 212 F. Supp. 95, 99 (E.D.N.Y.), affirmed, 332 F. 2d 629 (C.A. 2); *Gallagher* v. *United States Lines Co.*, 206 F. 2d 177, 179 (C.A. 2); *Grogan* v. *United States*, 341 F.2d 39 (C.A. 6).

[2] *Blaber* v. *United States*, 332 F. 2d 629 (C.A. 2); *Kirk* v. *United States*, *supra*, n. 1; see, also, *Wallach* v. *United States*, 291 F. 2d 69 (C.A. 2); *Buchanan* v. *United States*, 305 F. 2d 738 (C.A. 8). Petitioner's reliance (Pet. 7) on *Schmid* v. *United States*, 273 F. 2d 172 (C.A. 7), is misplaced. In that case the court construed the Illinois Scaffolding Act to place a duty on the owner of property to assure that scaffolding on the property complied with the requirements of the statute; there is no similar statute here. In any event, the *Schmid* decision was in effect overruled in *Cannon* v. *United States*, 328 F. 2d 763 (C.A. 7), where the court of appeals refused to follow *Schmid*, since the State Supreme

of appeals pointed out, there was no evidence whatever in this case showing that any improper practice or defective equipment was the cause of the explosion.

2. Petitioner argues that the dangerous nature of the work imposed on the government a non-delegable duty to employees of the contractor to ensure that the contractor performed the work safely. However, as the court of appeals noted (Pet. App. 29), such a duty normally does not extend to employees of an independent contractor nor does it impose liability upon one who neither owned nor controlled the property on which the death or injury occurred. See *Galbraith* v. *United States*, 296 F. 2d 631, 634 (C.A. 2); *Buchanan* v. *United States*, 305 F. 2d 738 (C.A. 8).[3] Further, the express terms of the Tort Claims Act preclude holding the government liable for the contractor's negligence: Congress excluded from the definition of the term "employee of the Government" (for whose negligence the United States is liable) independent contractors with the government. See 28 U.S.C. 2671.

Court had adopted a different construction of the Illinois Act. See *Gannon* v. *Chicago, Milwaukee, St. Paul & Pac. Ry. Co.*, 22 Ill. 2d 305, 175 N.E. 2d 785.

[3] Petitioner's reliance (Pet. 7) on *United States* v. *Pierce*, 235 F. 2d 466 (C.A. 6), affirming, on the basis of the district court's opinion, 142 F. Supp. 721 (E.D. Tenn.), is misplaced. While the court in that case purported to impose liability under a non-delegable duty rule, it in fact found specific negligence on the part of government employees (see 142 F. Supp. at 733-734). More important, there, unlike here, the United States owned, possessed, and controlled both the premises on which the injury occurred and the instrumentality which caused the injury.

3. Clearly not a question meriting review by this Court is whether or not the government may be deemed the "supplier" of the mold sets. Petitioner stresses that under the contract between Hercules and the government title to the mold sets vested in the United States. But, as the court of appeals pointed out, it is undisputed that the government never had possession or control of them: they were manufactured by, and at all relevant times were within the exclusive possession and control of, the contractor. In these circumstances, the United States plainly cannot be held liable on the theory that it failed to exercise reasonable care to make the mold sets safe for the use supplied—irrespective of whether it could in a technical sense be regarded as their "supplier" because it had bare title to them.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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DECEMBER 1965.

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